Supreme Court, U.S.
FILED
06-190 AUG 3 - 2006
OFFICE OF THE CLERK

No. 06-

IN THE

Supreme Court of the United States

HELMA W. LOWGREN,

Petitioner,

v.

R. JAMES NICHOLSON,
Secretary of Veteran Affairs,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The Question presented is does a dependent of a service connected disabled veteran have the right to receive compensation from the Survivor Benefit Plan (SBP) and compensation from the Dependency and Indemnity (DIC) plan without offset of the DIC compensation from her SBP compensation?

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The Department of Veterans Affairs Regional Office in Roanoke, Virginia denied Appellant's claim for accrued benefits but did not consider the issue as to removing the DIC compensation as an offset from the SBP compensation. The Board of Veterans Appeals opinion (per Shane A. Durkin, Board Member) reaffirmed the decision of the Regional Office denying the accrued disability benefit claim as being without merit. The issue as to the removal of the DIC compensation from SBP compensation was not considered and no ruling was made as to this issue. The United States Court of Appeals for Veterans Claims affirmed the Board decision but this Court also did not consider or rule on the Appellant's claim that her SBP compensation should not be reduced by the amount of her DIC compensation. The United States Court of Appeals for the Federal Circuit dismissed the appeal for lack of jurisdiction because the Appellant did not argue that the Veterans Court misinterpreted any statute or regulation nor did she raise any constitutional issues.

STATEMENT OF JURISDICTION

The Court of Appeals for the Federal Circuit decided the case on December 7, 2005. The Chief Justice extended the time to file this petition for a writ of certiorari to and including August 3, 2006. Petitioner invokes this Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

None

STATEMENT OF THE CASE

Appellant is the widow of MSG (E-8) Carl B. Lowgren, a service connected disabled veteran who died on 12/10/1999. At his death he was receiving military retirement pay but was not receiving any benefits administered by the Veterans Administration (VA). During his active duty, the veteran was eligible to purchase the Survivor Benefit Plan which is sold in percentages from the veterans Military Retirement Pay (MRP). MSG Lowgren purchased the highest percentage plan of 55% and paid for this plan. After Sgt. Lowgren's death, VA compensation was awarded and Mrs. Lowgren submitted a claim to the VA's Regional Office ("RO") seeking accrued benefits that she claimed Sgt. Lowgren was entitled at the time of his death. She also requested that her survivor benefit plan (SBP) benefits not be reduced by the amount of the Dependency and Indemnity (DIC) Compensation.

The Regional Office denied the request for accrued benefits because the Veteran was not receiving VA benefits when he died. He was not receiving any VA compensation because he did not elect to receive them. The Regional Office made no ruling as to the removal of the DIC compensation offset from SBP compensation.

Appellant appealed to the Board of Veterans Appeals and the Board considered the issue of entitlement to accrued benefits and affirmed the decision of the Regional Office. The Board did not consider or rule on the issue as to the DIC offset from SBP even though appellant wrote to the Board

of Veterans Appeals and again raised the issue in her Motion of 6/28/2002 to the Board.

Appellant appealed the decision to the United States Court of Appeals for Veterans Claims and specifically requested the Court to have the "Offset to my Dependency and Indemnity Compensation (DIC) removed." This Court affirmed the Board Decision but did not consider or rule on the DIC offset from the SBP compensation.

Appellant appealed to the United States Court of Appeals for the Federal Circuit. This Court only considered the ruling of the United States Court of Appeals for Veterans Claims and dismissed the appeal for lack of jurisdiction.

This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE PETITION

Appellant has handled her appeals Pro Se due to the fact that she is without funds to hire an attorney. The Courts have generally allowed much latitude to Pro Se litigants and have recognized such litigants are rarely schooled in the law and do not file perfect pleadings. Appellant basically raised two issues in the case:

1. The first issue was entitlement to accrued benefits and Appellant does not want to appeal this issue to the U.S. Supreme Court.

2. The second issue although not made in perfect legal form was a motion to remove the (DIC) compensation offset from the (SBP) compensation. The Roanoke Regional Office nor the Board of Veterans Appeals nor the United States Court

of Appeals for Veterans Claims nor the United States Court of Appeals for the Federal Circuit have considered or ruled on this issue which denies the issue without proper consideration. The Writ should be granted in the interest of justice as Disabled Veterans are being discriminated against and also they paid for the SBP plan. Deduction of the DIC compensation from the SBP compensation requires disabled Veterans to pay for the Disability Compensation which they are entitled to because they were service connected disabled veterans. This is grossly unjust and the Court should grant the Writ even though the other courts ignored this issue.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT FOR THE FEDERAL DISTRICT DECIDED DECEMBER 7, 2005

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

No. 05-7169

Helma W. LOWGREN,

Claimant-Appellant,

v.

R. JAMES NICHOLSON, Secretary of Veterans Affairs,

Respondent-Appellee.

DECIDED: December 7, 2005

Before MICHEL, *Chief Judge*, CLEVENGER, and SCHALL, *Circuit Judges*.

DECISION

Helma W. Lowgren appeals from the final decision of the United States Court of Appeals for Veterans Claims ("Veterans Court") that affirmed the decision of the Board of Veterans Appeals ("Board") denying Mrs. Lowgren's claim for accrued benefits. *Lowgren v. Nicholson, No. 02-2289, slip op.*, 2005 WL 1076709 (Vet.App. Mar. 17, 2005) ("Final Decision"). Because we understand Mrs. Lowgren to be

challenging only the Veterans Court's factual determinations or the court's application of law to the facts of her case, we lack jurisdiction. We therefore *dismiss* her appeal.

DISCUSSION

I.

At the time pertinent to this case, accrued benefits were defined by statute as "periodic monetary benefits to which an individual was entitled at death under existing ratings or decisions, or those based on evidence in the file at the date of death . . . and due and unpaid for a period not to exceed two years." 38 U.S.C. § 5121(a) (1999). For a surviving spouse to be entitled to accrued benefits, "the veteran must have had a claim pending at the time of his death for such benefits or else be entitled to them under an existing rating or decision." *Jones v. West*, 136 F.3d 1296, 1299 (Fed.Cir. 1998).

Mrs. Lowgren is the widow of Carl B. Lowgren, a veteran. Mr. Lowgren died on December 10, 1999. At the time of his death, Mr. Lowgren was receiving military retirement pay. However, he was not receiving any benefits administered by the Veterans Administration ("VA"). That is because Mr. Lowgren never waived all or part of his retirement pay during his lifetime in order to receive VA compensation. At the time of Mr. Lowgren's death, the VA was barred by statute from compensating veterans who received military retirement pay unless they filed a waiver of a portion or all of their retirement pay. *See* 38 U.S.C. § 5304 (1999); 38 C.F.R. § 3.750 (1999). When he died, Mr. Lowgren did not have a pending claim for VA benefits.

Appendix A

Following her husband's death, Mrs. Lowgren submitted a claim to the VA's Virginia Regional Office ("RO"). In her claim, Mrs. Lowgren sought accrued VA benefits that she asserted Mr. Lowgren was entitled to at the time of his death. In a May 2000 letter, the RO informed Mrs. Lowgren that she was not entitled to accrued benefits because Mr. Lowgren was not receiving any VA benefits when he died. The Statement of the Case that Mrs. Lowgren received in response to her subsequent Notice of Disagreement with the RO's decision explained that "[t]here were no payments due to Mr. Lowgren and unpaid at the time of [his] death because he did not execute an election during his lifetime" with respect to such benefits. Thereafter, in a September 12, 2002 decision, the Board denied Mrs. Lowgren's claim. The Board stated that because her husband had not elected to receive them, "there were no VA benefits due and payable at the time of [Mr. Lowgren's] death, and, thus, there are no accrued benefits payable to [Mrs. Lowgren] now." *Lowgren v. Nicholson*, No. XC4824472, slip op. at 7 (Bd. of Vet. Affairs Sept. 12, 2002).

Mrs. Lowgren appealed the denial of her claim to the Veterans Court. In the *Final Decision*, the Veterans Court affirmed the decision of the Board, stating:

> In this case, neither party disputes that Mr. Lowgren never executed a waiver of any portion of his [military retirement pay], and, there is likewise no indication in the record on appeal that such a waiver was executed during Mr. Lowgren's life. Absent such a waiver, there are no payments to which Mr. Lowgren would have been entitled,

> and, therefore, as a matter of law, Mrs. Lowgren is not entitled to any accrued benefits.

Final Decision, slip op. at 3 (citations omitted). After the Veterans Court affirmed the decision of the Board, Mrs. Lowgren appealed to this court.

II.

We have jurisdiction to review a decision of the Veterans Court to determine if its interpretation of a statute or regulation or its conclusion as to the validity thereof was 1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; 2) contrary to constitutional right, power, privilege, or immunity; 3) outside the Veterans Court's jurisdiction or a violation of statutory right; or 4) not in accordance with the required procedure. *Maxson v. Gober*, 230 F.3d 1330, 1332 (Fed.Cir.2000). We do not have jurisdiction to review a decision of the Veterans Court as to 1) a challenge to a factual determination; or 2) a challenge to a law or regulation as applied to the facts of a specific case. *Id.*; 38 U.S.C. § 7292(d)(2) (1999).

Mrs. Lowgren does not argue that the Veterans Court misinterpreted any statute or regulation or that any pertinent VA regulation is invalid. Nor does she raise any constitutional issues. At the same time, to the extent that she discusses the circumstances surrounding the denial of her claim for accrued benefits, her appeal must be viewed as a challenge to either the factual underpinnings of the Veterans Court's decision or the court's application of law to fact. Under these circumstances, Mrs. Lowgren's appeal is beyond the scope

of our jurisdiction. *See Helfer v. West*, 174 F.3d 1332, 1335-36 (Fed.Cir.1999).[1]

For the foregoing reasons, Mrs. Lowgren's appeal is dismissed for lack of jurisdiction.

Each party shall bear its own costs.

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1. On appeal, Mrs. Lowgren raises a number of issues that are not relevant to the denial of her claim for accrued benefits. Thus, she refers to such matters as the extent of her husband's disabilities, the medical treatment he received from the VA, and Survivors' Benefit Plan, Social Security, and Dependency and Indemnity Compensation benefits, as well as an unappealed 1999 RO rating decision that denied Mr. Lowgren's claim for special monthly compensation based upon the need for the regular aid and attendance of another person. As far as we can tell, none of these matters were raised before the Board or considered by the Veterans Court. For that reason, even if we did have jurisdiction in this case, we would not consider them. *See Forshey v. Principi*, 284 F.3d 1335, 1358 (Fed.Cir.2002) (*en banc*) (holding that this court generally will not decide issues not raised below); *see also Ballard Med. Prods. v. Wright*, 821 F.2d 642, 643 (Fed.Cir.1987).

APPENDIX B — OPINION OF THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS DATED MARCH 17, 2005

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 02-2289

HELMA W. LOWGREN,

APPELLANT,

V.

R. JAMES NICHOLSON,
SECRETARY OF VETERANS AFFAIRS,

APPELLEE.

Before GREENE, *Judge*.

ORDER

Note: Pursuant to U.S. Vet. App. R. 30(a), this action may not be cited as precedent.

Mrs. Helma W. Lowgren, the widow of veteran Carl B. Lowgren, appeals, pro se, a September 12, 2002, Board of Veterans' Appeals (Board) decision that denied VA accrued benefits on the basis that Mr. Lowgren never waived all or some of his military retirement pay (MRP) during his lifetime in order to receive VA compensation. Record (R.) at 1-8. On appeal, Mrs. Lowgren argues that, because at least in part of a purported change in law, she is entitled "to accrued

benefits[] for the two years preceding [her] husband's death." Appellant's Informal Brief (Br.) at 1; *see* Reply Br. at 5. The Secretary contends that the Board decision should be affirmed. He maintains that Mrs. Lowgren's arguments "lack legal merit" and that the Board decision is supported by an adequate statement of reasons or bases. Secretary's Br. at 5-8. This appeal is timely, and the Court has jurisdiction over the case pursuant to 38 U.S.C. §§ 7252(a) and 7266. Single-judge disposition is appropriate here. *See Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990). For the following reasons, the Court will affirm the September 2002 Board decision.

Mr. Lowgren served on active duty in the U.S. Army from February 1941 to July 1945 and from November 1945 to April 1972. *See* R. at 2, 11. Thereafter, he was in receipt of MRP. *See* R. at 5. A May 1974 VA regional office (RO) decision awarded him service connection for a variety of conditions, with a combined disability rating of 60%. R. at 18. At the same time, he was notified that "you may not receive full payment of service retired pay and VA compensation at the same time. . . [; h]owever, you may waive a portion of your retired pay or elect to receive VA compensation instead." R. at 20. He received similar notices (in letters accompanying RO decisions) in November 1984 (R. at 30), February 1986 (R. at 37), March 1987 (R. at 54), February 1992 (R. at 65), April 1996 (R. at 75), July 1997 (R. at 83-84), September 1998 (R. at 97), September 1999 (R. at 106), and November 1999 (R. at 115). There is no indication in the record on appeal that he responded to any of these notices or otherwise provided a waiver of any portion of his MRP. *See* R. at 1-258. He died on December 10, 1999. R. at 123.

Appendix B

A February 2000 RO decision awarded service connection for the cause of the veteran's death and awarded to Mrs. Lowgren accrued benefits "subject to the law governing payment of compensation." R. at 131-32. In a May 2000 letter to Mrs. Lowgren, the RO informed her that she had been granted dependency and indemnity compensation (DIC), but stated that VA could not pay her "[Mr. Lowgren's] rate for the month because [he] was not receiving VA benefits at the time of his death." R. at 136. In her April 2001 Notice of Disagreement, Mrs. Lowgren argued that she was entitled to additional monetary compensation, including accrued benefits. R. at 140. The subsequent Statement of the Case informed her that she could not receive accrued benefits for the two years preceding his death because "[t]here [wa]s no accrued benefit payable," and explained that "[t]here were no payments due to [Mr. Lowgren] and unpaid at the time of [his] death because he did not execute an election during his lifetime." R. at 149, 159. During a June 5, 2002, hearing before the Board, Mrs. Lowgren acknowledged that Mr. Lowgren had never elected to waive his MRP in exchange for VA disability benefits. R. at 213. In the September 12, 2002, Board decision here on appeal, the Board denied her claim for accrued benefits. R. at 8. In reaching this decision, the Board found:

> [Mrs. Lowgren's] claim for accrued benefits . . . is defeated by the undisputed fact that [Mr. Lowgren] never elected to receive his VA benefits in preference to his full MRP, which he continued to receive until his death. Without this election/waiver, there were no VA benefits due and payable at the time of [Mr.

> Lowgren's] death, and, thus, there are no accrued benefits payable to [Mrs. Lowgren] now.

R. at 7.

At the time of Mr. Lowgren's death, accrued benefits were defined as "periodic monetary benefits . . . to which an individual was entitled at death under existing ratings or decisions, or those based on evidence in the file at date of death . . . and due and unpaid for a period not to exceed two years." 38 U.S.C. § 5121(a) (1999). (The Veterans Benefits Act of 2003, Pub. L. No. 108-183, 117 Stat. 2651, amended section 5121(a) to remove the two-year limitation period on a survivor's recovery of accrued benefits; however, the amendment was not made retroactive and thus does not have application to Mr. Lowgren's death in this case.) For a surviving spouse to be entitled to accrued benefits, "the veteran must have had a claim pending at the time of his death for such benefits or else be entitled to them under an existing rating or decision." *Jones v. West*, 136 F.3d 1296, 1299 (Fed. Cir. 1998); *see Zevalkink v. Brown*, 102 F.3d 1236, 1241 (Fed. Cir. 1996) ("[A]n accrued[-]benefits claim is derivative of the veteran's claim for service connection, i.e., the claimant's entitlement is based on the veteran's entitlement.").

Before Mr. Lowgren's death in December 1999, VA was prohibited, under 38 U.S.C. § 5304, from paying compensation to a person concurrently with that person's receipt of MRP. *See* 38 U.S.C. § 5304; 38 C.F.R. § 3.750 (1999). However, under 38 U.S.C. § 5305 and 38 C.F.R. § 3.750(c) (2004), a person who was receiving MRP could have received VA

disability compensation upon the filing of a waiver of his or her MRP equal in amount to the VA compensation to which he or she was entitled. In this case, neither party disputes that Mr. Lowgren never executed a waiver of any portion of his MRP (*see* R. at 7, 213; Appellant's Informal Br. at 1-2), and, there is likewise no indication in the record on appeal that such a waiver was executed during Mr. Lowgren's life (*see* R. at 1-258). Absent such a waiver, there are no payments to which Mr. Lowgren would have been entitled, and, therefore, as a matter of law, Mrs. Lowgren is not entitled to any accrued benefits. *See* 38 U.S.C. §§ 5304, 5305; 38 C.F.R. § 3.750; *see also Sabonis v. Brown*, 6 Vet.App. 426, 429-30 (1994) (denying claim for lack of legal merit or lack of entitlement). Furthermore, as detailed by the Board, Mr. Lowgren's full award of MRP was more than the maximum amount of VA benefits to which he was entitled; therefore, even had he waived a portion of his MRP, "[t]he whole procedure would not [have] result[ed] in [Mrs. Lowgren's] obtaining and retaining any additional funds." R. at 7. Finally, although Mrs. Lowgren points to a "change in law" that she argues entitles her to these accrued benefits, the provision to which she cites (Appellant's Informal Br. at Ex. 13) appears to be a statutory benefit administered by the military, not VA. Therefore, to the extent that she would be eligible under that program, which it is beyond the jurisdiction of this Court to determine, *see* 38 U.S.C. § 7252(a), any such remedy would lie with the military, not with this Court or with the VA system.

Upon consideration of the foregoing, it is

ORDERED that the September 12, 2002, Board decision is AFFIRMED.

Appendix B

DATED: MAR 17, 2005

BY THE COURT:

s/ William P. Greene, Jr.
WILLIAM P. GREENE, JR.
Judge

APPENDIX C — TRANSMITTAL OF DECISION OF BOARD OF VETERANS APPEALS DATED SEPTEMBER 12, 2002-

IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

Vet. App. No. 02-2289

VA No. C4824472

HELMA LOWGREN,

Appellant

v.

Anthony J. Principi
Secretary of Veterans Affairs,

Appellee.

TRANSMITTAL OF DECISION OF BOARD OF VETERANS' APPEALS

Pursuant to U.S. Vet.App. Rule 4(c), a copy of the Board Decision on Appeal is hereby filed with the Court and the undersigned certifies, under penalty of perjury of the laws of the United States, that on this 16th day of Dec. 2002 a copy of said Board Decision on Appeal was mailed postage prepaid to:

Mr./Ms. HELMA LOWGREN
P.O. BOX 244
CLOLONIAL HEIGHTS, VA 23834-

Appendix C

s/ Kwasi Fields
KWASI FIELDS
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Representative for the Secretary
of Veterans Affairs

Appendix C

BOARD OF VETERANS' APPEALS
Department of Veterans Affairs
Washington, DC 20420

XC 4 824 472

IN THE APPEAL OF
HELMA W. LOWGREN

IN THE CASE OF
CARL B. LOWGREN

DATE 12 SEPT 02 KAF

DOCKET NO. 01-09 035

On appeal from the
Department of Veterans Affairs Regional Office
in Roanoke, Virginia

THE ISSUE

Entitlement to accrued benefits.

REPRESENTATION

Appellant represented by: Disabled American Veterans

WITNESS AT HEARING ON APPEAL

Appellant

Appendix C

ATTORNEY FOR THE BOARD

D. Dean, Counsel

INTRODUCTION

The appellant is the widow of a deceased veteran who had active service from February 1941 to July 1945, and from November 1945 to April 1972.

This matter comes before the Board of Veterans' Appeals (Board) from rating determinations by the Roanoke, Virginia Regional Office (RO) of the Department of Veterans Affairs (VA). In June 2002, the appellant and her representative appeared at a hearing held in Washington, D.C., before the undersigned and explained her contentions. A transcript of that hearing is of record.

FINDINGS OF FACT

1. During his lifetime, the veteran repeatedly declined to execute a waiver of any of his military retirement pay (MRP) so as to receive any VA disability compensation benefits instead.

2. Based upon the evidence in the file on the date of the veteran's death (December 10, 1999), there were no VA benefits due and unpaid at that time.

CONCLUSION OF LAW

Entitlement to accrued benefits is not established. 38 U.S.C.A. §§ 5121, 5304, 5305 (West 1991); 38 C.F.R. §§ 3.401(e)(2), 3.750 (2001).

Appendix C

REASONS AND BASES FOR FINDINGS AND CONCLUSION

I. Veterans Claims Assistance Act of 2000

Initially, the Board notes that during the pendency of this claim, the Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096 (2000), was signed into law. In addition, regulations implementing the VCAA (codified at 38 U.S.C.A. §§ 5100, 5102, 5103, 5103A, 5106, 5107, 5126 (West Supp. 2001)), were published at 66 Fed. Reg. 45,620, 45,630-32 (August 29, 2001) (to be codified at 38 C.F.R. §§ 3.102, 3.156(a), 3.159 and 3.326). The Board will assume, for the purposes of this decision, that the liberalizing provisions of the VCAA and the implementing regulations are applicable to the present appeal.

The Act and the implementing regulations essentially eliminate the threshold requirement that a claimant submit evidence of a well-grounded claim; they provide instead that VA will assist a claimant in obtaining evidence necessary to substantiate a claim unless there is no reasonable possibility that such assistance would aid in substantiating the claim. They also require VA to notify a claimant and the claimant's representative, if any, of any information, including any medical or lay evidence, not previously provided to VA that is necessary to substantiate the claim. As part of this notice, VA is to specifically inform the claimant and the representative, if any, of which portion, if any, of the necessary evidence must be provided by the claimant and which part, if any, VA will attempt to obtain on behalf of the claimant.

Appendix C

The current record reflects that the RO has informed the appellant in this case of the evidence and information needed to substantiate the claim through letters, the statement of the case and supplements thereto. In addition, this is essentially a legal claim in which the relevant facts, as set forth above, are not in dispute. Neither the appellant nor her representative has identified any additional evidence or information which could be obtained to substantiate the claim, and the Board is also unaware of any outstanding evidence or information that could be obtained to substantiate the claim or to change the outcome.

In sum, the facts pertinent to this claim have been properly developed, and no further action is required to comply with the VCAA or the implementing regulations. A remand to afford the RO an opportunity to consider the claim in light of the regulations implementing the VCAA would only serve to further delay resolution of the present claim with no benefit flowing to the appellant. Accordingly, the Board will address the merits of the claim.

II. Analysis

Except to the extent that MRP is waived, any person entitled to receive MRP based on service in the Armed Forces cannot receive those benefits concurrently with benefits payable under laws administered by VA (including disability compensation benefits). 38 U.S.C.A. § 5304(a); 38 C.F.R. § 3.750(a). Such a person may receive VA compensation benefits upon filing a waiver of so much of his or her MRP as is equal in amount to the VA compensation to which he or she is entitled. 38 U.S C.A. § 5305; 38 C.F.R. § 3.750(c).

Appendix C

Awards of VA disability compensation benefits payable to or for a veteran will be effective on the day following the discontinuance or reduction of MRP. 38 C.F.R. § 3.401(e)(2).

As pertinent to the present appeal, certain qualified survivors of deceased veterans shall, upon timely application, be paid certain periodic monetary benefits authorized by laws administered by VA to which the veteran was entitled at death under existing ratings or decisions, or those based upon evidence in the file at date of death, which were due and unpaid for a period not to exceed two years prior to the date of the veteran's death. 38 U.S.C.A. § 5121(a); 38 C.F.R. § 3.1000.

Based upon a claim received in 1973, service connection was initially established for multiple disabilities, rated 60 percent disabling in combination at that time. The veteran had been in receipt of MRP since his medical retirement from active service in April 1972. By letter dated in June 1974, the veteran was notified of this determination and told that he could not receive full payment of his MRP and VA disability benefits at the same time. In accordance with the controlling law and regulations at that time, he was provided the form (VA Form 21-561) for waiving a portion of his MRP or electing to receive VA benefits instead, and he was requested to complete the VA Form 21-561 within one year and return it. Full instructions and more information were also enclosed with this letter.

The veteran did not complete the VA Form 21-561 or otherwise waive any portion of his MRP at this time or at any subsequent time during his lifetime. Similar notices and

additional VA Form 21-561s were sent to the veteran in June 1974, December 1975, November 1984, February 1986, March 1987, February 1992, April 1996, July 1997, September 1998, September 1999, and November 1999 without any response from the veteran in the form of a waiver of any portion of his MRP. In a December 1992 letter, the appellant acknowledged that the veteran had deliberately elected to receive his full MRP rather than receive all or any part of his VA compensation benefits. She confirmed this in her testimony at the June 2002 hearing. *See* Transcript, p. 6. At no time during his lifetime did the veteran elect to receive VA compensation benefits instead of his full MRP, which he continued to receive until his death. At the time of his death, the veteran's MRP was $2700 per month, increasing to $2764 in December 1999.

The veteran died on December 10, 1999, and VA Dependency and Indemnity Compensation benefits were later awarded to his widow, the appellant, based upon his service-connected death. Based upon a review of the evidence in the file at the time of the veteran's death, a rating action dated December 16, 1999, found that the rating for service-connected pulmonary fibrosis should be increased from 60 percent to 100 percent disabling, effective from his entry into a VA hospital on October 3, 1999; and that special monthly compensation (SMC) under 38 U.S.C.A. § 1114(s), based on a service-connected disability rated at 100 percent and additional disabilities rated at 60 percent or more, was also warranted from the same date. This rating action would have entitled the veteran to increased monthly VA payments (for the veteran and his spouse) of $2342 (increasing to $2397 in December 1999), if his MRP had been waived in this amount.

Appendix C

See Veterans Benefits Administration Manual *M21-1*, *Adjudication Procedures*, Part I, Appendix B.

The appellant contends that the veteran should have been entitled to a higher level of SMC under 38 U.S.C.A. § (1) due to his need for the regular aid and attendance (A&A) of another individual. If true, this would have entitled the veteran to monthly VA benefits of $2589 in 1999 (increasing to $2650 in December 1999), if his MRP had been waived in this amount. This higher rate had been denied during the veteran's lifetime by a rating action dated in September 1999, and the veteran had not initiated an appeal of this determination before he died. The appellant also contends that the 100 percent schedular rating for pulmonary fibrosis should have been effective from 1997, rather than from October 1999. This would have no effect on the veteran's basic award of compensation, since he had been rated totally disabled due to unemployability since June 1985; it might have pushed back the effective date for the award of SMC under 38 U.S.C.A. § 1114(s), but only if the claimed SMC award based on A&A was not in effect concurrently.

However, regardless of the merits of the appellant's various arguments for an increased level of VA compensation during the veteran's lifetime, her claim for accrued benefits based upon these arguments is defeated by the undisputed fact that the veteran never elected to receive his VA benefits in preference to his full MRP, which he continued to receive until his death. Without this election/waiver, there were no VA benefits due and payable at the time of the veteran's death and, thus, there are no accrued benefits payable to the appellant now.

The appellant has also argued that the veteran would have waived his MRP if SMC based upon A&A had been granted

during his lifetime because then his VA compensation benefits would have been the greater benefit. Aside from the completely speculative nature of this argument, it is also factually incorrect, since the veteran's full award of MRP of $2700 per month in 1999 was more than the corresponding SMC-A&A level of $2585 per month. The Board would also point out that the legal prohibition against concurrent payments of MRP and VA compensation benefits remains in effect so that, even if it were legally possible to favorably entertain the appellant's accrued benefits claim, any VA benefits ultimately paid to her under such a determination would automatically create an overpayment of MRP benefits in the same amount, which would then have to be repaid. The whole procedure would not result in the appellant obtaining and retaining any additional funds.

It is true, as the appellant has pointed out, that Congress is currently reviewing the policy of prohibiting concurrent payments of MRP and VA benefits; but so far no legislation has been proposed or passed which would help the appellant in her current predicament. In cases such as this, where the law is dispositive, the claim should be denied because of the absence of legal merit. *Sabonis v. Brown*, 6 Vet.App. 426 (1994). Accordingly, the appeal is denied.

ORDER

Entitlement to accrued benefits is denied.

s/ Shane A. Durkin
Shane A. Durkin
Member, Board of Veteran's Appeals

Appendix C

IMPORTANT NOTICE: We have attached a VA Form 4597 that tells you what steps you can take if you disagree with our decision. We are in the process of updating the form to reflect changes in the law effective on December 7, 2001. *See* the Veterans Education and Benefits Expansion Act of 2001, Pub. L. No. 107-103, 115 Stat. 976 (2001). In the meanwhile, please note these important corrections to the advice in the form:

- These changes apply to the section entitled "Appeal to the United States Court of Appeals for Veterans Claims." (1) A "Notice of Disagreement filed on or after November 18, 1988" is no longer required to appeal to the Court. (2) You are no longer required to file a copy of your Notice of Appeal with VA's General Counsel.

- In the section entitled "Representation before VA," filing a "Notice of Disagreement with respect to the claim on or after November 18, 1988" is no longer a condition for any attorney-at-law or a VA accredited agent to charge you a fee for representing you.

APPENDIX D — LETTER FROM SHANE DURKIN BOARD MEMBER BOARD OF VETERANS APPEALS DATED AUGUST 19, 2002, DENYING APPELLANT'S MOTION OF JUNE 28, 2002 TO CORRECT THE TRANSCRIPT

DEPARTMENT OF VETERANS AFFAIRS
Board of Veterans' Appeals
Washington DC 20420

In Reply Refer To: 014DS3183
XC 4 824 472
LOWGREN, Carl B.

Mrs. Helma W. Lowgren
Post Office Box 244
Colonial Heights, VA 23834

Dear Mrs. Lowgren:

This is a ruling on your motion of June 28, 2002, to correct the transcript of your June 5, 2002, hearing before the Board in Washington, DC. The motion was received at the Board on July 8, 2002.

Good cause has not been shown. Therefore, I must deny your motion. However, the Board will consider your statement of June 28, 2002 during its review and consideration of your appeal. Your appeal is being returned to await consideration by a member of the Board. When the Board reaches its decision, you will be promptly notified.

Sincerely yours,

s/ Shane A. Durkin
Shane A. Durkin
Board Member